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November 29, 2023

**By ECF**The Honorable Gregory H. Woods  
United States District Court  
Southern District of New York  
Daniel Patrick Moynihan Courthouse  
500 Pearl Street, Room 2260  
New York, NY 10007*Cardwell v. Davis Polk & Wardwell LLP, et al.,*  
19-cv-10256-GHW (S.D.N.Y.)

Dear Judge Woods:

As discussed at the November 27, 2023 status conference, Defendants seek to admit Plaintiff's performance reviews under the business records exception to the rule against hearsay. FRE 803(6). In that connection, Defendants are hereby providing Plaintiff and the Court with a certification under Rule 902(11) from Lindsay H. Tomenson ("Tomenson Declaration"), the Chief Professional Development Officer at Davis Polk. Rule 803(6)(D) provides that a party may demonstrate that records satisfy the conditions of the business records exception by a certification that complies with Rule 902(11). Rule 902(11) provides that such certification is required before trial. The

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admission of these documents as business records will greatly promote the efficiency of the trial.<sup>1</sup>

Consistent with numerous other courts in the Second Circuit, this Court has recognized that performance reviews are admissible as business records under Rule 803(6). *Ramsaran v. Booz & Co. (N.A.) Inc.*, 2015 WL 5008744, at \*7-9 (S.D.N.Y. Aug. 24, 2015) (Woods, J.) (collecting cases).

The performance reviews held to satisfy Rule 803(6) in *Ramsaran* are similar to the reviews at issue here. The *Ramsaran* reviews were created by the plaintiff's manager after interviewing the plaintiff's colleagues regarding her performance during the preceding months. The Court held these performance reviews, created by collecting information from others at various intervals, were "made at or near the time by—or from information transmitted by—someone with knowledge." *Id.* at \*8 (quoting FRE 803(6)(A)). The Court also determined that the reviews were made in the course of the employer's "regular process of evaluating its employees' job performance" and that the company had a "regular practice" of conducting such reviews. *Id.* at \*9 (quoting FRE 803(6)(B) and (C)). As the Tomenson Declaration shows, the performance reviews at issue here similarly satisfy the elements of Rule 803(6).

Further, in *Ramsaran*, the Court found that the plaintiff failed to substantiate her allegation that the negative performance reviews were motivated by discrimination, noting that there was "no evidence from which the Court could conclude that either the source of the information in these records or the method or circumstances of their preparation indicate a lack of trustworthiness under Rule 803(6)(E)." *Id.* at \*9. So, too, here. There is no evidence here that the source of the information or the method or circumstance of the preparation of Plaintiff's reviews indicate a lack of trustworthiness. Plaintiff only offers speculation and innuendo.

To the extent any of Plaintiff's performance reviews contain "multiple levels of hearsay" as Plaintiff has asserted, that is not a reason to exclude them. Rule 803(6) is applicable to such reviews, even if Plaintiff's assertion is accurate. In addition, Defendants seek to introduce these records for the truth of the reviewing attorney's views and understanding of Plaintiff's performance; they are not being offered for the truth of any purported embedded hearsay. There is no factual basis to believe that the records do not accurately reflect the reviewing attorneys' assessments and understanding of Plaintiff's work, regardless of whether Plaintiff agrees with those assessments.

Finally, the performance reviews are admissible as non-hearsay in any event—evidence of what the decisionmakers at Davis Polk relied upon in deciding whether and when to terminate Plaintiff. As noted in *Ramsaran*, even if the defendant's "assessment

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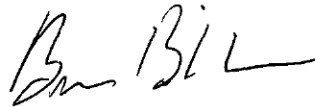
<sup>1</sup> We are also providing Plaintiff with the underlying performance reviews certified by the Tomenson Declaration. Defendants have previously provided these exhibits to Plaintiff during the pretrial exchange of exhibits.

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of plaintiff's job performance *was* inaccurate, 'what is significant is that they based their decision to dismiss plaintiff on *that* belief,' rather than her gender or pregnancy." *Id.* at \*10 (quoting *Agugliaro v. Brooks Bros.*, 927 F. Supp. 741, 747 (S.D.N.Y. 1996)). As the Court went on to say, "The Court declines to sit as a super-personnel department and evaluate whether plaintiff's performance was really deficient. It is well documented that defendants believed that it was." *Id.*

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Bm BIL", written over a horizontal line.

Bruce Birenboim

cc: All counsel of record via ECF